

September 24, 2009

**Ex Parte**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

*Re: Special Access Rates for Price Cap Local Exchange Carriers  
WC Docket No. 05-25*

Dear Ms. Dortch:

On September 23, 2009, Parul Desai of the Media Access Project, Dan Mitchell of the National Telecommunications Cooperative Association, Sascha Meinrath from the New America Foundation, Art Brodsky of Public Knowledge, Colleen Boothby for the Ad Hoc Telecommunications Users Committee, Charles McKee of Sprint Nextel, Kelsi Reeves of tw telecom, Thomas Jones of Willkie Farr & Gallagher, Sheba Chacko of BT, Amy Wolverton of T-Mobile USA, Grant Spellmeyer of US Cellular, Tony Hansel of Covad, Cathy Sloan of CCIA, Russ Merbeth of Integra Telecom, Jason Wakefield of Covad, Lisa Youngers of XO, Julia Strow of One Communications and Cbeyond, and I met with Commissioner Mignon Clyburn and Carol Simpson, Legal Advisor for Commissioner Clyburn on the topic of special access. The group discussed the attached presentation and requested that the Commission issue its data request on special access as soon as possible.

Pursuant to the Commission's rules, a copy of this notice is being filed electronically in the above-referenced docket. If you require any additional information please contact the undersigned.

Sincerely yours,

  
Paul Margie

cc: meeting participants

# Special Access Reform

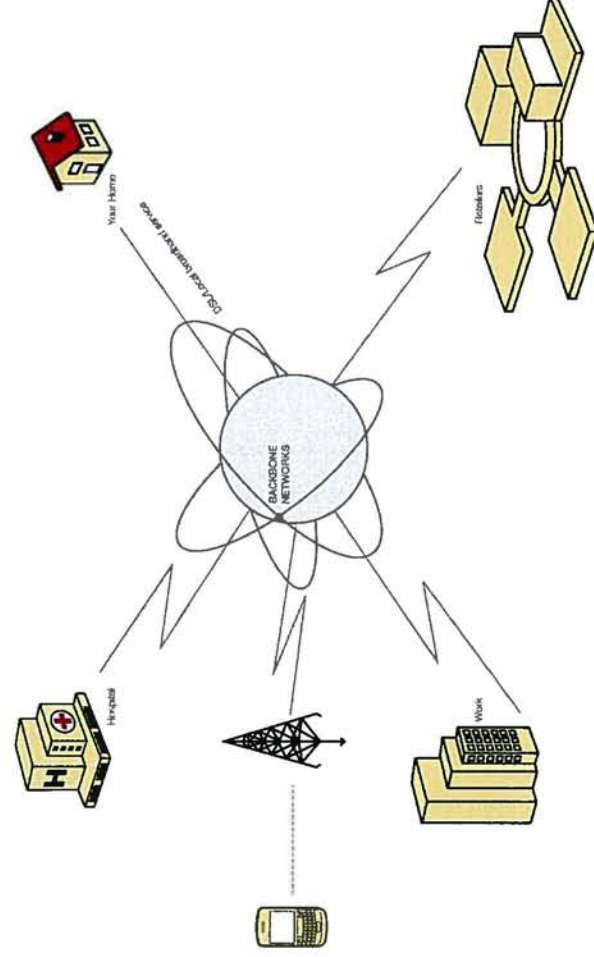
*Delivering on the  
Promise of Broadband*

# Just Some of the Supporters of Reform





# Special Access Connects to the World



# Special Access is Critical to the Broadband Ecosystem

- Who uses special access?

Better question: Who *doesn't* use special access?

- Schools and universities
- Hospitals
- Next generation 911
- Federal, state, and local governments
- Rural telecommunications providers
- Wireless carriers
- All major industry channels from financial services to manufacturing to retail
- Small, medium, and enterprise businesses
- **Anyone who needs a dedicated data connection.**



# Reform Means Broadband Deployment

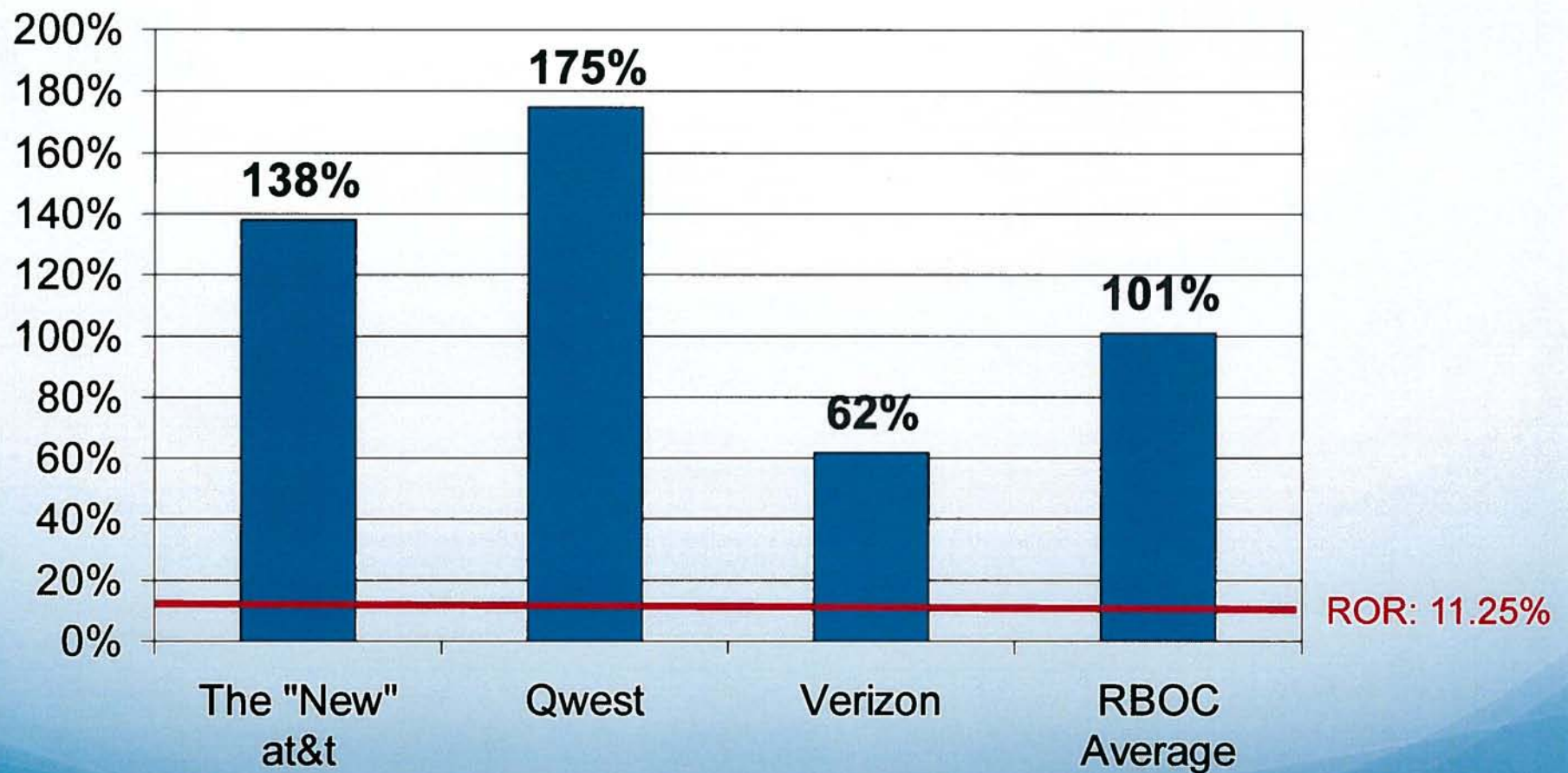
- **Rural telecommunications providers:** lower prices enable delivery of broadband services to unserved and hard to serve communities.
- **Wireless carriers:** expanded and advanced data networks.
- **Schools:** expanded access to Internet; tele-learning.
- **Public Safety:** expanded access to network resources.
- **Health care providers:** advanced telemedicine; electronic medical records; improved administrative efficiency and cost savings.
- **Governments:** improved electronic services to constituents.
- **Businesses:** Intranet and Internet access; cost savings, improved productivity.
- ***And on and on and on...***



# This is a Broken Market

- **The market in almost every part of the country does not support competition for core DS-1, DS-3, and similar Ethernet channel termination facilities.**
  - AT&T and Verizon control an overwhelming percentage (90%, according to ARMIS data) of the special access market across the country.
  - Even in the urban core, where competition should be most prevalent, AT&T and Verizon still dominate.
  - NRRI, and GAO studies confirm this lack of competition.
- **2006 DOJ analysis of Verizon-MCI and SBC-AT&T mergers shows why proximate fiber does not equal competition:**
  - Competitor wouldn't deploy to a building as close as 1/10<sup>th</sup> of a mile from its facilities unless demand was  $\geq 2$  DS-3s (approx. 88 Mbps).
  - Competitor wouldn't deploy to a building within 1 mile from its facilities unless demand was  $\geq$  an OC-48 (approx. 2.4 Gbps).

## Special Access RORs for 2007





# The Result ...

- Unreasonably high prices and anticompetitive terms and conditions that purchasers are forced to accept because there is no alternative.
- Prices are vastly inflated.
- Profits far above “just and reasonable.”
- Prices way above comparable products (UNEs, FiOS).
- Terms and conditions stifle what little competition might otherwise develop.
- Term and volume commitments lock up demand.



# Incumbents' Arguments Against Reform Don't Add Up

- They refuse to provide relevant data.
- They can only find “competition” by conflating markets.
  - But high-capacity transport market and core channel terminations market are very different.
- Cable, fixed wireless are not significant competitive options for these facilities.
- They hide the ball by saying most MSAs are under some pricing regulation.
  - But the vast majority of the population, and the vast majority of special access revenues, are in “price flex” areas.
  - And even where regulation remains, it is regulation in name only as prices bear no relationship whatsoever to cost.
- ***Incumbents are advocating non-factual arguments because they cannot argue against the facts: special access is not competitive, it is a huge cash cow for incumbents, and they don't want to give it up.***



# How Did this Happen, Anyway?

- The FCC eliminated protections and eliminated rational productivity accounting because it predicted competition would arise – but competition did not arise.
- The special access market is a monopoly in most parts of the country but existing regulations pretend too many areas are competitive – the “trigger” is defective.
- CALLS Order was intended to last 5 years and the FCC should have acted to put the next step in place – but it's been 9 years since CALLS.



# What Should Be Done

- **The FCC should issue a fast and focused data request as soon as possible.**
  - The FCC has more than adequate record now:
    - In nearly every market, we see no evidence of competition for DS-1s, DS-3s, and similar Ethernet channel termination facilities and ILEC profits are far above “just and reasonable” by any reasonable measure.
  - We welcome more data – we only request that the FCC’s upcoming data request be fast and focused.
    - NoChokePoints members have already committed to providing significant competitively sensitive material, including precise locations of competitive network facilities.
- **Delay means billions of dollars more to line ILEC coffers rather than being invested in broadband facilities and delivered to consumers through lower prices.**



# Three Necessary Reforms

- Once the FCC sees the data it should:
  - **Fix the pricing flexibility “competitive triggers”** – Present triggers do not identify competitive areas, nor do they identify where competition is likely to occur.
  - **Lower prices** – The FCC relaxed price regulations on the prediction that competition would arise to restrain prices, but it never happened.
  - **Address anticompetitive terms and conditions** – Anticompetitive terms and conditions on existing discount plans stifle what little competition might otherwise arise.